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IN THE

United States Supreme Court

METRO-GOLDWYN-MAYER STUDIOS, INC., *ET AL.*,

Petitioners,

v.

GROKSTER, LTD., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL RIGHTS OWNERS SUPPORTING PETITIONERS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. DENYING INTERNATIONAL RIGHTS OWNERS EFFECTIVE MEANS OF ENFORCING THEIR RIGHTS AGAINST MASSIVE INFRINGEMENTS ON PEER-TO-PEER SERVICES CONTRAVENES INTERNATIONAL AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY

II. THE DECISION BELOW STRIPS INTERNATIONAL RIGHTS OWNERS OF AN EFFECTIVE MEANS OF ENFORCING THEIR RIGHTS

III. THIS DECISION WILL BE TAKEN INTO CONSIDERATION AS COURTS OUTSIDE THE UNITED STATES GRAPPLE WITH THESE ISSUES

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

A&M Records, Inc. v. Napster, Inc.,
239 F.3d 1004 (9th Cir. 2001), *affirming* 114 F. Supp. 2d 896 (N.D. Cal. 2000) 18

Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64 (1804) 14

Asia Media Inc. v. Yang,
No. 2002KAHAP77 (Suwon Dist. Ct., Seongnam Branch, First Civil Dep't, July 9, 2002) 19

China Steel Corp. v. United States,
264 F. Supp. 2d 1339 (Ct. Int'l Trade 2003) 11

Fed. Mogul Corp. v. United States,
63 F.3d 1572 (Fed. Cir. 1995) 14

Global Digital Tech. Co.,
92 Sue Tze No. 728 (Shi-Lin Dist. Ct., Dec. 4, 2003) 20

Hopson v. Kreps,
622 F.2d 1375 (9th Cir. 1980) 10

In re Aimster Copyright Litig.,
334 F.3d 643 (7th Cir. 2003) 16

In re Charter Communications, Inc.,
2005 U.S. App. LEXIS 31 (9th Cir. Jan. 4, 2005) 6

Interim Application of Fashion-Now Co., Ltd. et al.,
92 Sue Tze No. 2146 (Taipei Dist. Ct., Aug. 31, 2004) 20

MGM Studios, Inc.,
259 F. Supp. 2d 1029 (C.D. Cal., 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004) 1, 6, 15, 17

Nippon Columbia Co. v. Yugen Kaisha Nippon MMO,
2002 (Wa) Case No. 4249 (Tokyo Dist. Ct., 29th Civil Div. Jan. 29, 2003) 19

PAM, S.p.A. v. United States,
265 F. Supp. 2d 1362 (Ct. Int'l Trade 2003) 11

Parfums Givenchy, Inc. v. Drug Emporium, Inc.,
38 F.3d 477, 484 (9th Cir. 1994) 8

Rock Records (Taiwan) Co. v. Fashion-Now Co.,
92 Tsai Chueng No. 20 (Taipei Dist. Ct., Dec. 1, 2003) 20

Rock Records (Taiwan) Co., v. Global Digital Tech Co
92 Tsai Chueng No. 2082 (Shi-Lin Dist. Ct., Dec. 11, 2003) 20

Sony Corp. v. Universal City Studios, Inc.,
464 U.S. 417, 104 S. Ct. 774 (1984) 14

Timken v. United States,
240 F. Supp. 2d 1228 (Ct. Int'l Trade 2003) 11

United States v. Moghadam,
175 F.3d 1269 (11th Cir. 1999) 9

STATUTES

UCC, art. IV 9

17 U.S.C. § 104 7

17 U.S.C. § 104(b) 8

17 U.S.C. § 104(c) 10

17 U.S.C. § 107 9

OTHER AUTHORITIES

4 NIMMER ON COPYRIGHT § 18.06[B][2] 9

H.R. REP. NO. 103-826, 103d Cong., 2d Sess., pt. 1 (1994) 15

H.R. Doc. No. 103-316, 103d Cong., 2d Sess.(1994) 15

A. Dixon, *Internet Copyright Litigation: Non-U.S. Development*, BNA World E-Commerce & IP Report, June 2003 18

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Berne Convention for the Protection of Literary & Artistic Works, July 24, 1971, U.S. Senate Treaty Doc. 99-27, KAV 2245, 1 B.D.I.E.L. 715 ..... 7, 8, 9

Certain German Interests in Polish Upper Silesia, [1926] PCIJ Rep., Series A, No. 7 13

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971), Oct. 29, 1971 25 U.S.T. 309, T.I.A.S. 7808, 888 U.N.T.S. 67, reprinted at http://www.wipo.int/clea/docs/en/wo/wo023.htm. 8

India - *Patent Protection for Pharmaceuticals Protection & Agricultural Chemical Products*, No. 95-0000 (WT/DS50/ABIR, Dec. 19, 1997) 12, 13

P. Geller, 1 *Int'l Copyright Law & Practice*, ¶ 3[3](b) 8

P. Geller, 1 *Int'l Copyright Law & Practice*, ¶ 3[4](a) 10

RIAJ Press Release, *Court decided Japan MMO, a file sharing service company, for illegality*, available at http://www.riaj.com/e/news/20030129.html (Jan. 29, 2003) 19

Report of the Panel, *Unites States-Section 110(5) of the U.S. Copyright Act*, Case No. 00-2284 (WT/DS160/R, June 15, 2000) 9

Report of the Panel, *Unites States-Section 337 of the Tariff Act of 1930* (BISD 36S/345, Nov. 7, 1989) 13

Request for Consultations by the United States, *European Communities - Enforcement of Intellectual Property Rights for Motion Pictures & Television Programs*, No. 98-1824 (WT/DS124/1, IP/D/13, May 7, 1998) 11, 13

Request for Consultations by the United States, *Greece - Enforcement of Intellectual Property Rights for Motion Pictures & Television Programs*, No. 98-1813 (WT/DS125/1, IP/D/14, May 7, 1998) 11, 13

Universal Copyright Convention (Paris text, 1971) 1 B.D.I.E.L. 813, reprinted at http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml 8

Uruguay Round Trade Agreement, Texts Of Agreements, Implementing Bill, Statement Of Administrative Action & Required Supporting Statements, in H.R. Doc. No. 103-316, 103d Cong., 2d Sess. (1994) 15

WIPO Copyright Treaty, S. Treaty Doc. No. 105-17, at 1, 36 I.L.M. 65 (Geneva, 1997), reprinted at http://www.wipo.int/treaties/documents/english/word/s-wct.doc 8

WIPO Performances & Phonograms Treaty, S. Treaty Doc. No. 105-17, at 18, 36 I.L.M. 76 (Geneva, 1997), reprinted at http://www.wipo.int/treaties/documents/english/word/s-wppt.doc 8, 9

BRIEF OF *AMICI CURIAE* INTERNATIONAL RIGHTS OWNERS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI*

All parties have consented to the filing of this *amicus* brief.[1]

The parties joining this *amicus* brief, listed below (the "International Rights Owners") are trade associations and professional organizations based outside the United States, representing hundreds of thousands of owners of copyrights and related rights all over the world. Specifically, *amici* represent record companies, producers and distributors; music and literary publishers; composers and authors of a variety of protected works; rights societies; film producers; musical, theatrical and audiovisual performers and video publishers, in more than 100 countries outside the United States.

Amici hope to address more directly than the parties the potentially devastating impact of the decision below, *Metro-Goldwyn-Mayer Studios, Inc.*, 259 F. Supp. 2d 1029 (C.D. Cal., 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), on the international intellectual property landscape, and its equally harmful potential disruptive effect on the harmonization of intellectual property law and the development and maintenance of uniform protection of intellectual property rights in the international arena.

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[1] No counsel for any party authored this brief in whole or part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission hereof.

From the perspective of *amici*, this case is primarily about ensuring that the United States does not falter in its responsibilities under various international agreements and norms, by permitting a safe haven for entities to set up businesses deliberately designed to enable copyright infringement on a massive scale. That is a perspective we hope the Court will find informative.

* * *

Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique ("BIEM"), founded in 1929 and headquartered at Neuilly-sur-Seine, France, is the international organization representing 44 mechanical rights societies in 42 countries, which societies license the reproduction of songs including musical, literary and dramatic works. One of BIEM's principal missions is to negotiate compensation for its members, the licensors of copyrighted works, for the uses of their works by others.

International Confederation of Societies of Authors and Composers ("CISAC"), founded in 1926 and headquartered at Neuilly-sur-Seine, France, is a non-governmental, non-profit organization with a membership of 207 authors' societies in 109 countries, which societies represent more than 2 million creators of musical, dramatic, and literary works, as well as works involving the visual and graphic arts. One of CISAC's principal objectives is to watch over, safeguard and contribute to the legal interests of creators, both in the international sphere and in national legislation.

International Confederation of Music Publishers ("ICMP/CIEM"), established as an association under Swiss law in Lausanne, Switzerland, is the umbrella non-profit trade organization which globally represents, through its 32 members – national, regional and international music publishers' trade associations in Europe, Northern and Latin

America, Australasia and Africa – most of music publishing throughout the world. Taking action against unauthorized Internet usage of copyrighted music is one of the priorities for ICMP/CIEM within its mission of promoting the value of songs and of the people who create, and who help to create, music. ICMP/CIEM has observer status at the Geneva-based WIPO.

International Federation of Actors ("FIA"), founded in 1952, is an international non-governmental organization registered in the United Kingdom. FIA currently represents the interests of 104 performers' unions, guilds and associations in 76 countries around the world, from North and Latin America, to Europe, Africa and Australasia. FIA is a recognized non-governmental organization at UNESCO, the International Labour Organization (ILO), the World Intellectual Property Organization (WIPO), the International Theatre Institute (ITI) and the Council of Europe. FIA's affiliates represent hundreds of thousands of professional actors, singers, dancers, choreographers, broadcast professionals and other artists on a wide range of issues relating to the social and professional protection of performers, including their intellectual property rights.

International Federation of the Phonographic Industry ("IFPI"), founded in 1933 and having its registered office in Zurich, Switzerland, is a non-profit trade association representing the international recording industry. IFPI's approximately 1,450 record company members, located in 75 countries, own copyrights and related rights in sound recordings. IFPI's activities focus on combating traditional hard goods and on-line piracy, promoting legislation that protects the rights of intellectual property owners, and encouraging healthy trade and electronic commerce in recorded music.

International Federation of Film Producers Associations ("FIAPF"), founded in 1933 and based in Paris, France, is made up of 30 national producers' organizations in 27 countries. FIAPF's mission is to defend and promote the economic and legal interests of film and audiovisual producers on a global basis. FIAPF participates in copyright and neighboring rights' protection activities, anti-piracy efforts, the promotion and maintenance of audiovisual technology standards, and incentive policies for film production/distribution.

International Publishers Association ("IPA"), based in Geneva, Switzerland, established as an association under Swiss law in 1896, represents the worldwide book and journal publishing industry (print and electronic) through its 78 national and specialized member associations in 66 countries. One of IPA's main objectives is to promote a chain of strong and enforceable copyright laws around the world, including for electronic publishing. IPA enjoys observer status at the United Nations and its agencies, such as the Geneva-based WIPO and Paris-based UNESCO, and participates in developments at the Geneva-based WTO.

International Video Federation ("IVF") is a non-profit international association established in 1988 under Belgian law, with the aim of providing national video associations with international representation of their members' interests as publishers and distributors of pre-recorded video cassettes and DVDs. Based in Brussels, Belgium, the IVF represents thousands of video publishers in numerous international fora, including the European Communities, WIPO, WTO and the United Nations institutions. Like the other *amici*, IVF has a strong interest in protecting the worldwide rights of its members, and supports the promotion and fostering of consistent and effective international enforcement of copyright.

SUMMARY OF ARGUMENT

The decision below is inconsistent with international agreements to which the United States is a party. Under these agreements, the United States has an obligation not only to recognize the intellectual property rights that are violated by unauthorized uses of copyrighted works on the Internet, but also to provide rights owners—particularly foreign rights owners such as *amici*—***adequate and effective means of enforcing such rights***.

The decision below raises two major concerns for international rights owners as to the enforceability of their rights.

The first concern is whether they will be able to enforce their rights effectively and protect them from being infringed, on a massive and unprecedented scale, in the United States, if the decision below is not reversed. Far from promoting effective enforcement of copyright, the decision below immunizes parties that are responsible for the infringement of copyrighted works on a massive scale, and effectively holds that in the face of such copyright infringement, copyright owners have no effective recourse whatsoever against such parties.

The Ninth Circuit's decision thus severely limits the practical ability of right owners such as *amici* to enforce their rights effectively against one of the most virulent species of online infringements – those carried out using peer-to-peer networks designed to facilitate infringement – and thereby threatens to place the United States in breach of its international obligations and responsibilities. This is particularly true in the context of what the Ninth Circuit called today's "quicksilver technological environment," where infringements are possible, and are occurring, on a

scale across the globe that nobody could ever have imagined, only a short while ago. (380 F.3d at 1167).[2]

The second concern is the potential spill-over effect that the Ninth Circuit's decision could have for enforcement of copyright and related rights outside the United States, especially against the unauthorized distribution, use and reproduction of material emanating from the United States. Rights owners have always faced the problem of pursuing counterfeit or infringing copies, produced in countries with lax copyright enforcement practices, that cross borders and infiltrate markets in other countries. If United States law is now perceived to allow businesses, like defendants' to function without restraint, or is perceived as inconsistent and unreliable, this spill-over problem will be global, massive and impossible to reverse.

[2] The Ninth Circuit noted that defendants did not "seriously contest" that of the millions of files copied and distributed through their services, "the vast majority are exchanged illegally in violation of copyright law." 380 F.3d at 1160. The District Court similarly found that it was "undisputed" that defendants' software and networks were being used to carry out direct infringements of copyright (which of course includes internationally guaranteed exclusive rights). 259 F. Supp. 2d at 1034; 1037; *see also In re Charter Communications, Inc.*, 2005 U.S. App. LEXIS 31, *7 (9th Cir. January 4, 2005) ("Approximately 90% of the content on [peer to peer] systems is copyrighted movies, software, images and music disseminated without authorization. It is estimated more than 6.2 billion allegedly infringing music file are downloaded monthly.").

ARGUMENT

I. Denying International Rights Owners Effective Means Of Enforcing Their Rights Against Massive Infringements On Peer-to-Peer Services Contravenes International Agreements To Which The United States Is A Party.

International rights owners such as *amicis'* members are protected in the United States by a number of international agreements concerning the protection of intellectual property (all of which are reproduced in the appendices to Professor Nimmer's treatise). The main agreements of relevance here include:

- the Berne Convention for the Protection of Literary and Artistic Works (protecting "authors" and their representatives and assignees in all fields),[3]
- the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (protecting a range of rights owners on substantive and enforcement issues).[4]

[3] July 24, 1971, U.S. Senate Treaty Doc. 99-27, KAV 2245, 1 B.D.I.E.L. 715, 17 U.S.C. § 104; *also reprinted at* http://www.wipo.int/clea/docs/en/wo/wo001en.htm (the "Berne Convention").

[4] Agreement on Trade Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1125, 1197, *reprinted at* http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (the "TRIPs Agreement").

- the WIPO "Internet Treaties" (protecting authors, producers and performers on Internet and other matters),[5]

- the Universal Copyright Convention (protecting authors in parallel with the Berne Convention),[6] and
- the Geneva Phonograms Convention (protecting producers against unauthorized reproduction of their phonograms).[7]

A host of other international legal obligations of the United States require similar or related protections.[8] All these international agreements guarantee non-U.S. owners of rights in intellectual property substantive rights, which have been enacted into law.[9] These include rights to authorize or prohibit reproduction,[10] distribution,[11] Internet transmission[12] and other substantial uses of their works and other protected material. The agreements allow for exceptions or limitations to these rights, but only in certain special cases that do not conflict with the normal exploitation of the material, and that do not unreasonably prejudice the legitimate interests of the rights holders.[13]

The TRIPs Agreement, which provides "the highest expression to date of binding intellectual property law in the international arena" (*United States v. Moghadam*, 175 F.3d 1269, 1272 (11th Cir. 1999) (citation omitted)), for the first time also imposes far reaching requirements in the enforcement of intellectual property rights.[14] Thus, Article 41(1) of the TRIPs Agreement requires:

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5 WIPO Copyright Treaty, S. Treaty Doc. No. 105-17, at 1, 36 I.L.M. 65 (Geneva, 1997), *reprinted at* http://www.wipo.int/treaties/documents/english/word/s-wct.doc (cited as "WCT" herein); WIPO Performances and Phonograms Treaty, S. Treaty Doc. No. 105-17, at 18, 36 I.L.M. 76 (Geneva, 1997), *reprinted at* http://www.wipo.int/treaties/documents/english/word/s-wppt.doc ("WPPT").

6 (Paris text, 1971), July 24, 1971, 25 U.S.T. 1341, T.I.A.S. 7868, 1 B.D.I.E.L. 813, *reprinted at* http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml ("UCC").

7 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971), Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. 7808, 888 U.N.T.S. 67, *reprinted at* http://www.wipo.int/clea/docs/en/wo/wo023en.htm.

8 *See generally* P. Geller, 1 *Int'l Copyright Law & Practice*, ¶¶ 3[3](b) (outlining United States treaty ratifications and implementation in the international copyright area).

9 *See* 17 U.S.C. § 104(b) (foreign author may claim U.S. copyright under certain circumstances), cited in *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 484 (9th Cir. 1994).

10 Berne Convention, art. 9; TRIPs Agreement, art. 9, 14; WCT, art. 1(4) (incorporating Berne requirements); WPPT, arts. 7, 11; UCC, art. IV *bis*(1); Geneva Phonograms Convention, art. 2.

11 Berne Convention, art. 14(1) (distribution of cinematographic works); TRIPs Agreement, arts. 11, 14(4) (rental of computer programs, cinematographic works, phonograms); WCT, arts. 6-7; WPPT, arts. 8-9, 12-13; UCC, arts. V, VI; Geneva Phonograms Convention, art. 2.

12 These rights, encompassed under general provisions of earlier treaties, are embodied explicitly in WCT, art. 8; WPPT, arts. 10, 14.

13 Berne Convention, art. 9(2); TRIPs Agreement, art. 13; WCT, art. 10; WPPT, art. 16; UCC, art. IV; Geneva Phonograms Convention, art. 6; *See generally* 17 U.S.C. § 107; World Trade Organization, Report of the Panel, *United States – Section 110(5) of the U.S. Copyright Act*, Case No. 00-2284 (WT/DS160/R, 15 June 2000) (interpreting Berne Convention art. 9(2) and TRIPs tests).

14 "TRIPs stands unique among international copyright compacts in the sophistication of its enforcement mechanisms . . . . [G]iven that TRIPs contains enforcement provisions far more efficacious than those extant under Berne, it can be anticipated that TRIPs will set the international standard for enforcement." 4 Nimmer on Copyright § 18.06[B][2], at 18-67.

> Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to ***permit effective action*** against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies ***to prevent infringements*** and remedies ***which constitute a deterrent*** to further infringements. (emphasis supplied)[15]

Amici do not argue here that any of the particular international intellectual property agreements of the United States should be given "direct effect."[16] The application of the "direct effect" doctrine is a complex issue, which is not necessary to resolve with respect to any particular international agreement here.[17]

Nevertheless, courts have viewed international obligations like the WTO TRIPs agreement as "persuasive authority" in interpreting questions that arise under its

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15 The WIPO Internet Treaties contain a similar requirement. *See, e.g.*, WCT, art. 14; WPPT, art. 23.

16 *See generally Hopson v. Kreps*, 622 F.2d 1375, 1381 (9th Cir. 1980) (discussing "direct effect" and self-execution concepts).

17 *See generally* Geller, *1 Int'l Copyright Law & Practice* § 3[4](a), at INT-89: "The situation in the United States is ambiguous. The United States Congress made abundantly clear its intent to leave the Berne Convention without any self-executing force. At the same time, the U.S. Senate acknowledged both the courts' exclusive power to decide 'the question of whether a treaty is self-executing' and the courts' responsibility for enforcing 'appropriate domestic law' to protect the rights of Berne claimants. The Congressional intent—in so many words, as the U.S. Copyright Act [17 U.S.C. § 104(c)] now states, to preclude any 'reliance upon . . . the provisions of the Berne Convention'—cannot therefore be read to compel an ostrich-like refusal by the courts to consult any Berne text at all" (citations omitted).

implementing legislation.[18] Indeed, "plaintiffs are free to argue that Congress would never have intended to violate an agreement it generally intended to implement without expressly saying so." *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1367 (Ct. Int'l Trade 2003) (reviewing WTO Agreements' obligations in dumping area), citing *Timken v. United States*, 240 F. Supp. 2d 1228, 1238 (Ct. Int'l Trade 2003).

Traditionally, in the international arena, the United States has sought more stringent, rather than less stringent, respect for intellectual property rights, and it has consistently taken the position in its negotiations with its WTO partners that "effectiveness" of a party's enforcement and remedies means enforcement and remedies that "work in practice."

The one formal WTO dispute in the copyright area involving the "effectiveness" requirements of Article 41 of TRIPs is highly instructive.[19] In May, 1998, the United States requested consultations with Greece and the European Communities under the WTO dispute-settlement procedure. The United States claimed that Greece and the EC were in violation of, *inter alia*, Article 41 not only because of statutory shortcomings but also because the remedies on the books had had no practical effect on the problem of widespread piracy.

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18 *PAM, S.p.A. v. United States*, slip. op. 2003-48, n.13 (Ct. Int'l Trade May 8, 2003).

19 *See* Request for Consultations by the United States, *European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, No. 98-1824 (WT/DS124/1, IP/D/13, 7 May 1998); Request for Consultations by the United States, *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, No. 98-1813 (WT/DS125/1, IP/D/14, 7 May 1998).

As evidence of this, the United States cited the facts that a "significant number" of television stations in Greece regularly broadcast copyrighted United States films and television programs without authorization of the copyright owners, and that infringement occurred repeatedly and continuously despite efforts by United States rights holders to pursue their claims in Greece.[20] The United States claimed that "effective remedies against copyright infringement do not appear to be provided or enforced in Greece" and that "this situation appears to be inconsistent with the obligations of Members under Articles 41 and 61 of the TRIPS Agreement."[21]

The dispute ultimately ended by mutually agreed settlement, which documented both legislative and law-enforcement initiatives undertaken to remedy the piracy at issue, as well as to monitor the *actual* effectiveness of the actions taken and remedies available, that is, significantly reduced levels of television piracy in Greece.

Judicial decisions such as this one, moreover, form an important part of the analysis of whether a particular country is in compliance with its TRIPs obligations. Particularly relevant to a consideration of the TRIPs requirement of "effective action" to prevent and deter piracy, the WTO Appellate Body in *India -- Patent Protection for Pharmaceutical Protection and Agricultural Chemical Products* repeated the principle from a 1926 Permanent Court of International Justice case instructing that national compliance be evaluated broadly on the basis of numerous factors, including judicial decisions:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[22]

It is particularly appropriate in this case to apply the principle that judicial decisions, among other state actions, can play a key role in determining whether "in applying [its] law, [the United States] is acting in conformity with its obligations" under the TRIPs Agreement.

The decision below essentially renders unavailable to rights holders an important enforcement mechanism (vicarious or contributory liability) rooted in the statutes, and which has been repeatedly articulated by the courts, the result of mapping common-law principles to that particular terrain of copyright law. To the extent the decision below works to make "effective action" against online infringement "unavailable" to rights holders, including by denying expeditious preventive remedies and undermining deterrence, United States compliance with its international obligations could be called into question. A reversal, on the

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20 *See* Requests for Consultations by the United States, *supra*.

21 *Id.*

22 *India – Patent Protection for Pharmaceuticals Protection and Agricultural Chemical Products*, No. 95-0000, (WT/DS50/ABIR, 19 Dec. 1997) ¶ 65, at 25, citing *Certain German Interests in Polish Upper Silesia*, [1926] PCIJ Rep., Series A, No. 7, at 19; *see also id.* ¶ 67, at 25-26, citing Report of the Panel, *United States—Section 337 of the Tariff Act of 1930* (BISD 36S/345, 7 Nov. 1989) (panel conducted detailed examination of United States legislation and practice, including court proceedings).

other hand, would be both (a) a proper application of domestic law (as Petitioners and others assert); and (b) would comport well with the U.S.'s obligations to provide its partners effective enforcement in the copyright area.

Finally, Congress should be assumed to have intended that "effective enforcement" as required under international copyright agreements would be available in the United States, including under the contributory and vicarious liability doctrines.[23] "GATT [now WTO] agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations." *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995), citing *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) (act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains).

There is no statutory language or other expression of Congressional intent anywhere in the history of United States accession to the WTO or the WIPO Internet Treaties that suggests that Congress wished to derogate from the international obligations assumed by the United States government in a way that would deprive international rights owners of effective means of enforcing their rights against

[23] As Petitioners have demonstrated, the situation requiring effective enforcement here is very different from the situation presented in *Sony Corp of America v. Universal City Studios, Inc.* 464 U.S. 417, 104 S. Ct. 774 (1984). Among other things, the underlying activity at issue here is widespread, massive infringing reproductions and distributions occurring at the speed of light, across the globe, not substantial "fair use," and the intermediary has an ongoing relationship with the direct infringers.

the sort of infringements at issue here. Indeed, the indicia of legislative intent are directly to the contrary.[24]

II. The Decision Below Strips International Rights Owners Of An Effective means Of Enforcing their rights.

Amici are principally concerned that the decision below in practice leaves international rights holders without an effective means of enforcing their rights against what both Courts below characterized as widespread infringements involving millions of individuals, promoted by services that "clearly know that many if not most of those individuals who downloaded their software subsequently use it to infringe copyrights" (259 F. Supp. 2d at 1037) and that defendants "may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares" (*id.* at 1046).

[24] Hence, when legislation to implement the TRIPs Agreement was presented to Congress by the U.S. Administration in 1994, the Agreement was described as "establish[ing] comprehensive standards for the protection of intellectual property and the enforcement of intellectual property rights in WTO member countries," and "ensur[ing] that critical enforcement procedures will be available in each member country to safeguard intellectual property rights." Uruguay Round Trade Agreement, Texts Of Agreements, Implementing Bill, Statement Of Administrative Action And Required Supporting Statements, in H.R. Doc. No. 103-316, 103d Cong., 2d Sess. (1994) at 981, Uruguay Round Trade Agreements Act, at 312. While, understandably, the focus of legislative consideration was on how the TRIPs Agreement "will dramatically improve protection and enforcement of U.S. intellectual property rights abroad," H.R. Rep. No. 103-826, 103d Cong., 2d Sess., pt. 1 (1994) ("Benefits of the Uruguay Trade Agreements"), there was nothing to indicate that this benefit was to be obtained at the cost of denying effective enforcement for domestic and international rights holders under U.S. law.

If such knowing facilitators of and contributors to massive infringement cannot be stopped and ordered to act responsibly with respect to copyrighted material, what effective enforcement mechanism *is* realistically available? The decision below leaves few, if any, practical options. For example, even if the alternative of bringing suits against large numbers of individual infringers may be a possibility for large and well-funded rights owners, many of *amicis'* members are small or otherwise insufficiently funded for that ever to be a real option.

If unauthorized mass reproduction and distribution via the Internet cannot be stopped in the United States at the hub of such activity -- the services that knowingly promote, assist and profit from massive infringements -- it would put rights owners in the untenable position of having to chase every unauthorized copy and transmission to every one of the other countries to which they are distributed. Such a result would be unnecessary, unwarranted and potentially devastating as a practical matter, to *amici*.

The doctrines of vicarious and contributory liability evolved precisely in order to provide rights owners an effective remedy against massive infringement in situations where they otherwise would not have it. As Judge Posner said in *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003):

> Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers ("chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem," Randal C. Picker, "Copyright As Entry Policy: The Case of Digital Distribution," 47 Antitrust Bull., 423, 442 (2002)), the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aidor and abettor.

In making its judgment in this case, this Court should give careful consideration to what remedies *are* available for rights owners to enforce their rights effectively against what are probably the most widespread infringements in history, in a world where infringement increasingly knows no borders.[25]

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25 As noted by the Petitioners below, the District Court's finding that "substantial noninfringing uses" exist for defendants' services and software because people might use them "in countries where it is legal" (259 F. Supp. 2d at 1035) does not appear supported by the record. In any event, it cannot seriously be contended that the behavior of any "lowest common denominator" country—one that might refuse to follow international agreements requiring the global protection of intellectual property rights—should constrain those nations that seek to provide the required protections.

III. This Decision Will Be Taken Into Consideration As Courts Outside The United States Grapple With These Issues.

The Ninth Circuit's decision will have a deleterious ripple effect on similar cases involving so-called "decentralized" peer-to-peer file transmission and copying services in other countries. Although courts in every country apply their own national laws and look to their own legal precedents and authorities, they also are informed by judicial decisions in the United States involving new Internet issues. Parties (including *amici*) do provide information on United States court judgments and raise arguments from United States court decisions as persuasive authority in other jurisdictions.

The importance of the judicial decisions from the United States in the international arena cannot be overstated. For example, United States courts dealt first with the issues surrounding so-called "centralized" peer-to-peer services in the *Napster* litigation.[26] Since then, cases brought and decided so far in Japan and Korea have reached the same result against similar services.[27] In both cases, the parties submitted information on the decisions of the District Court and the Ninth Circuit in *Napster*, and the reasoning of these decisions appears to have been taken into account in the foreign courts' judgments.

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26 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), *affirming A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

27 *See* A. Dixon, *Internet Copyright Litigation: Non-U.S. Developments*, BNA World E-Commerce & IP Report, June 2003, at 5, 6-7. The following case reports are taken from the referenced article.

In *Nippon Columbia Co., Ltd., et al. v. Yugen Kaisha Nippon MMO*,[28] defendant Japan MMO operated a peer-to-peer service used by approximately 42,000 persons, who collectively made available about 80,000 files at any one time. Like Napster, Japan MMO created an index of files available for download, and users transmitted and copied files directly to each other. The court found, both at the preliminary injunction and "interlocutory judgment" stage, that not only were users violating plaintiffs' exclusive right under the copyright law of "making transmittable" plaintiffs' works and recordings, but Japan MMO itself played a role in the infringing acts. Japan MMO was enjoined from offering the service on April 9, 2002, and was found liable on the merits on January 29, 2003.

In *Asia Media Inc. et al v. Yang et al.*,[29] members of the Recording Industry Association of Korea (RIAK) filed civil claims against the Korean "file sharing" service Soribada on February 8, 2002. On July 9, 2002, the court issued an injunction requiring the peer-to-peer service to stop letting users download the plaintiffs' recordings, to stop operating the service on the Korean Data Centre's servers, and to pay a $170,000 guaranty.[30]

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28 2002 (Wa) Case No. 4249 (Tokyo Dist. Ct., 29th Civil Division, interlocutory judgement 29 Jan. 2003). *See* RIAJ Press Release, *Court decided Japan MMO, a file-sharing service company, for illegality; Interlocutory judgment by the Tokyo District Court*, http://www.riaj.com/e/news/20030129.html (29 Jan. 2003).

29 No. 2002KAHAP77 (Suwon Dist. Ct., Seongnam Branch, First Civil Dep't, 9 July 2002).

30 RIAK also filed parallel criminal proceedings, and the prosecutor indicted the two operators, in August 2001, charging them with aiding and abetting infringement. The criminal case was dismissed on May 15, 2003, on the ground that the charges did not adequately specify how Soribada aided and abetted copyright infringement. The prosecutor has appealed this dismissal to the High Court, and the appeal is pending.

Pending in Taiwan at present are criminal and civil proceedings against the subscription peer-to-peer services EzPeer and Kuro, which started out as "centralized" services using Napster-based technology but which are migrating to "decentralized" and encrypted technology. To date, the Taiwan courts have issued injunctions requiring removal of 105 copyrighted recordings from both services.[31] As part of the proceedings, however, Kuro has asked the trial court to consider the Ninth Circuit's ruling in *Grokster* — perhaps predictably without any mention of the Seventh Circuit's ruling in *Aimster* — as authority for Kuro's proposition that all decentralized peer-to-peer services should be immune from liability in Taiwan.[32]

As courts like these outside the United States begin considering Internet issues involving the new generation of peer-to-peer services like Grokster, it is in the interest of *amici* and all affected parties that United States law provide helpful and consistent guidance, on how massive infringements on services like these can be stopped, and in particular, how key enablers and facilitators such as defendants can and should be held responsible.

This will help to promote consistent international treatment of Internet-based activities, a key goal of the evolving international treaty structure in the intellectual property field. Only after effective and consistent

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31 *Rock Records (Taiwan) Co. Ltd et al. v. Fashion-Now Co., Ltd.*, 92 Tsai Chueng No. 20 (Taipei Dist. Ct., injunction issued Dec. 1, 2003); *Rock Records (Taiwan) Co., Ltd. et al. v. Global Digital Technology Co., Ltd.*, 92 Tsai Chueng No. 2082 (Shi-Lin Dist. Ct., injunction issued Dec. 11, 2003). *See also Fashion-Now Co., Ltd. et al.*, 92 Sue Tze No. 2146 (Taipei District Ct., criminal indictment issued Dec. 1, 2003); *Global Digital Technology Co., Ltd. and others*, 92 Sue Tze No. 728 (Shi-Lin Dist. Ct., criminal indictment issued Dec. 4, 2003).

32 *Interim Application of Fashion-Now Co., Ltd*, 92 Sue Tze No. 2146 (Taipei Dist. Ct., filed Aug. 31, 2004).

enforcement mechanisms are in place against infringement can the legitimate on-line use of copyrighted materials ultimately and best be developed and maintained in the international arena.

CONCLUSION

For all the foregoing reasons, *amici* respectfully submit that this Court reverse the judgment of the Court below.

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